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Supreme Court of the United States

OCTOBER TERM, 1924

No. 489 [illegible] 957.

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG AMERICAN LINE), APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

WILLIAM B. DEVOE,
Attorney for Appellant.

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SUPREME COURT OF THE UNITED STATES

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HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG AMERICAN LINE), APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS.

Foreword.

The appellant in the case at bar and the appellant in the case of *North German Lloyd* vs. *United States*, now pending on appeal in this Court, filed a joint brief in the Court below, in which the two cases were heard together. For this reason certain paragraphs of this brief may be found to be identical with paragraphs of the brief filed by the North German Lloyd in this Court.

OPINION OF COURT BELOW.

The decision of the Court of Claims was embodied in a memorandum accompanying the judgment entered March 17, 1924, dismissing claimant's petition and sustaining defendant's demurrer thereto (R. 6). In this memorandum the Court stated that it had no jurisdiction for the reasons given in its opinion in the case

of *Deutsch-Australische Dampfschiffs-Gesellschaft* vs. *United States*, decided simultaneously with the present case (R. 6). Neither this opinion nor the memorandum have been officially reported, but they are set forth at pages 6 to 13 of the Record herein.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The judgment to be reviewed was entered March 17, 1924 (R. 6). The action of the Court below in dismissing the petition of the appellant (claimant below), sustaining defendant's demurrer thereto and ruling that it had no jurisdiction (R. 6) are relied on as the basis of this Court's jurisdiction. This jurisdiction is invoked pursuant to Sections 242 and 243 of the Judicial Code as the same existed prior to the changes effected by the Act of Congress of February 13, 1925. An appeal to this Court was applied for on June 10, 1924 (R. 13) and allowed by the Court of Claims on June 16, 1924 (R. 14). The record on appeal was filed on June 27th, 1924 (R. 14). The appeal was therefore pending in this Court when the Act of February 13, 1925, went into effect, and by Section 14 of that Act appellant's right to invoke the jurisdiction of this Court was not affected by said Act. Numerous cases might be referred to sustaining such jurisdiction, as it existed prior to the Act of February 13, 1925, to hear cases like the one at bar. One of the most recent and typical of these is the case of *A. W. Duckett & Company* vs. *United States*, 45 Supreme Court Reporter 38. In that case the Court of Claims dismissed claimant's petition for want of jurisdiction, on the ground that no contract could be implied on the part of the United States to compensate claimant (58 Court Claims, 234, 403). An appeal to this Court was sought and allowed, and this Court reversed the judgment, with directions to the Court of Claims to award proper com-

pensation to the appellant. That case is thus closely analogous to the case at bar, and involves the same mode of procedure resorted to here.

STATEMENT OF THE CASE.

This action was brought in the Court of Claims by the appellant (claimant below) to recover from the United States the sum of $98,613,780, being the aggregate value of thirty merchant vessels belonging to appellant, title to which was taken by the United States on various dates in May, June and July, 1917. The action was commenced by the filing of appellant's petition on April 5, 1923 (R. 1). Besides listing the vessels and their respective values this petition alleges substantially as follows:

1. That appellant is a German corporation, and for many years up to and including July, 1914, operated steamship services in various parts of the world (R. 1).

2. That in August, 1914, these services were discontinued because of the outbreak of the European War, and certain merchant vessels belonging to appellant thereupon remained in various ports of the United States and its possessions, which they had entered in the ordinary course of commercial voyages, as ports of refuge to avoid the risk of capture; and in like manner certain other merchant vessels belonging to appellant shortly thereafter entered into and remained in such ports (R. I, 2).

3. That all of said vessels still remained in said ports as ports of refuge on April 6, 1917, when war was declared by the United States against Germany, and on that day were entered upon and taken possession of by the United States (R. 2).

4. That on May 12, 1917, a Joint Resolution was adopted by Congress and approved by the President, the title and body of which were as follows:

"Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessels in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy, be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascer-

tain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings, to the Secretary of the Navy, who shall preserve such report with the records of the department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation." (R. 2, 3).

5. That on various specified dates in May, June and July, 1917, title to all of appellant's said vessels (which are enumerated) was or purported to be taken over by the United States, by virtue of executive orders made by the President under the authority of said Joint Resolution (R. 3, 4).

6. That no compensation has been paid or awarded to appellant (R. 4); that no action has been taken on the claim in Congress nor any request made for such action (R. 5); that appellant is sole owner of the claim, has made no assignment thereof, is justly entitled to the amount claimed, and has not aided or abetted rebellion against the United States (R. 5); that Germany accords to American citizens reciprocal rights to sue in her courts (R. 1).

7. The petition asserts that appellant's claim is founded on the Constitution, the Joint Resolution of May 12, 1917, above referred to, an implied contract with the Government to pay compensation and a claim not sounding in tort for unliquidated damages for the reasonable value of appellant's vessels (R. 4, 5).

On May 26, 1923, the Government demurred to appellant's petition on the ground that it did not state a cause of action against the United States (R. 6).

On February 18, 19 and 20, 1924, the demurrers in this case and several other cases involving the same

questions were argued and submitted (R. 6), and on March 17, 1924, the Court of Claims rendered judgment sustaining said demurrer and dismissing appellant's petition (R. 6). In an accompanying memorandum that Court stated that it had not jurisdiction, for the reasons set forth in an opinion rendered on the same date in the case of *Deutsch-Australische Dampfschiffs-Gesellschaft* vs. *U. S.* (R. 6). This opinion is printed in full on pages 6 to 13 of the record herein.

Carl L. Schurz, theretofore attorney for the appellant, died May 19, 1924. On June 7, 1924, William B. Devoe, appellant's present attorney, was on motion substituted for Mr. Schurz as appellant's attorney of record (R. 13).

An appeal from the judgment of the Court below was applied for on June 10, 1924 (R. 13) and the appeal was allowed on June 16, 1924 (R. 14). The printed record was filed in this Court on June 27, 1924 (R. 14).

SPECIFICATION OF ERRORS.

1. The Court below erred in dismissing appellant's petition and sustaining the demurrer of the Government thereto.

2. The Court below erred in deciding that appellant's petition did not state a cause of action against the United States.

3. The Court below erred in deciding that it had not jurisdiction in the case at bar.

ARGUMENT.

I.

THE COURT BELOW ERRED IN HOLDING THAT APPELLANT'S PETITION HEREIN DID NOT STATE A CAUSE OF ACTION AGAINST THE UNITED STATES.

To sustain this proposition it will be shown that although Congress could have confiscated appellant's ships, yet it did not do so. In support of this contention it will be pointed out that the mere taking of private property for public uses under the war powers of Congress does not in itself import a confiscation of such property; that confiscation of enemy property is contrary to the traditional policy of the United States and to modern conceptions of international law, and will therefore never be presumed unless an intent to confiscate is expressly indicated; that the Joint Resolution of May 12, 1917, under which appellant's ships were taken, gives no indication of an intent to confiscate them, but every circumstance connected with that Resolution and every inference which can fairly be drawn from it indicates an intent *not* to confiscate.

It will next be shown that if appellant's ships were not confiscated they must have been taken by an exercise of the power of eminent domain, because there is no other method by which the Government can take private property for a public use; and if the ships were taken by virtue of that power, then appellant is entitled under the Constitution to receive compensation for them, and is not deprived of that Constitutional protection because it was an alien enemy corporation at the time of the taking.

A. It is not the power of Congress to confiscate appellant's ships but the fact that there was confiscation, which is disputed by appellant.

It may be conceded at the outset that one of the inherent rights possessed by every sovereign government is the right to confiscate the property of enemies in time of war, and that this right may be exercised by Congress as one of the war powers conferred upon it by the Constitution. The right was declared to exist by this Court as long ago as 1796, in the case of *Ware* vs. *Hylton*, 3 Dallas 199. The exercise of this right has since then frequently been reprobated on grounds of justice and morality, both by this Court and others and it has fallen into complete disuse as will be shown in a subsequent part of this brief. Nevertheless the naked right still exists, and could not be challenged on strictly legal grounds.

It is, however, equally well established that this power can, under our form of government, only be exercised by Congress, and that a declaration of war does not of its own force bring the power into play. Authority for these propositions is found in the case of *Brown* vs. *United States*, 8 Cranch 110, decided by this Court in 1814. It is the purpose of this brief to show that in the present instance there is nothing to indicate that a confiscation of appellant's ships was intended or effected by Congress, but that on the contrary every circumstance indicates an intent *not* to confiscate them.

B. The public policy of the United States, since its earliest days, has been opposed to confiscation of enemy property, and an intent to confiscate can therefore never be presumed but must be expressly indicated.

The mere taking of private property by Congress under its war powers does not, of course, import a confiscation of the property thus taken. During the recent war more than seventeen different enactments were

passed by Congress pursuant to these powers, in which various references were made to compensating the owners of the property seized, but in no instance except the case at bar has it been suggested that a confiscation was intended. (These legislative enactments are enumerated in a foot-note in 256 U. S. on page 553). In determining whether such was the actual intent of Congress, it is pertinent to consider that the public policy of the United States, since its earliest days, has been opposed to the confiscation of enemy property.

During the Revolution the Continental Congress did not enact any confiscatory measures. The Treaty of Peace between the United States and Great Britain, of September 3, 1783 (Treaties and Conventions Between the United States and Other Powers, Government Printing Office, 1889, p. 375), provided that Congress should recommend to the Legislatures of the several States to provide for the restitution of all property rights of British subjects that had been confiscated. Some years later the United States concluded the Jay Treaty with England, and the treatment of enemy property became the subject of widespread public discussion. In this Alexander Hamilton was the leading protagonist of the view that enemy property should not be made the subject of confiscation. Hamilton's services as a member of the Convention which framed the Constitution, as the man who did more than any other to procure its ratification by the States, as Secretary of the Treasury and leading member of the Cabinet in the administration of Washington as President, entitle his views upon any question of policy to as weighty consideration as those of any man whom our country has produced. Hamilton wrote his "Camillus Letters" about 1795, principally for the purpose of persuading the country to adopt, for that time and the future, the policy of extending protection to the property of aliens found within our borders if by the accident of

circumstances our Government and theirs should come to be at war. We quote from the "Camillus Letters" as follows:

"XVIII. No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation.

"It would have been an inestimable gem, in our National Constitution, had it contained a positive prohibition against such a practice, except, perhaps, by way of reprisal, for the identical injury on the part of another nation.

"There is, indeed, ground to assert, that the contrary principle would be repugnant to that article of our Constitution which provides, that 'no State shall pass any law impairing the obligation of contracts.' The spirit of this clause, though the letter of it be restricted to the States individually, must, on fair construction, be considered as a rule of the United States; and if so, could not easily be reconciled with the confiscation or sequestration of private debts in time of war. But it is a pity that so important a principle should not have received an express and direct sanction.

"XIX. The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security.

"There is no parity between the case of the persons and goods of enemies found in our country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; they are deemed to owe a temporary allegiance; and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and equity; it is to add cowardice to treachery. In the latter case there is no confidence whatever reposed in us; no claim upon our hospitality, justice, or good faith; there is the simple character of an enemy, with entire liberty to oppose force to force.

"Moreover, the property of the foreigners within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to the treasury, in common with other similar property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction, upon the breaking out of a war, the confiscation of a property, which, during peace, serves to augment the resources and nourish the prosperity of a state?

"The property of a foreigner placed in another country, by permission of its laws, may justly be

> regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner, when he has personally given no cause for its deprivation?"

The country's early jurists were also outspoken against the policy of confiscation.

In *Brown* v. *U. S.*, 8 Cranch, 110, 3 L. Ed. 504, Chief Justice Marshall, while admitting that the sovereign (that is to say, in our country, the Congress) had the power to pass confiscatory measures, did not refrain from condemning the exercise of the power. Concerning it he says (p. 128 of 8 Cranch, p. 510 of 3 L. Ed.):

> "• • • The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although *it cannot be disregarded by him without obloquy,* yet it may be disregarded" • • • (Italics ours.)

In the same case Justice Story wrote a dissenting opinion, but on the point in question, of the evil policy of confiscating enemy property, he was in agreement with the majority of the Court. Referring to the "Camillus Letters," Nos. 18 to 23, Judge Story says (p. 141 of 8 Cranch, p. 515 of 3 L. Ed.):

> "• • • I admit, in the fullest manner, the great merit of the argument which he has adduced against the confiscation of private debts due to enemy subjects. Looking to the measure not as of strict right, *but as of sound policy and national honor, I have no hesitation to say that the argument is unanswerable.* He proves incontrovertibly what the highest interest of nations dictates with

a view to permanent policy; but I have not been able to perceive the proofs by which he overthrows the ancient principle," (that is, that enemy property was formerly subject to confiscation).

He further says (p. 145 of 8 Cranch, p. 516 of 3 L. Ed.):

"* * * I am not bold enough to interpose a limitation where Congress have not chosen to make one; and I hold, that, by the act declaring war, the executive may authorize all captures which, by the modern law of nations, are permitted and approved. It will be at once perceived that in this doctrine I do not mean to include the right to confiscate debts due to enemy subjects. *This, though a strictly national right, is so justly deemed odious in modern times, and is so generally discountenanced that nothing but an express act of Congress would satisfy my mind that it ought to be included among the fair objects of warfare* * * *" (Italics ours.)

(N. B.: The majority opinion held that *Congress alone, not the President,* has the power in any case.)

Many of the old cases, and also the textwriters on international law, speak of debts and credits of enemies. This seems to be because these were the forms of enemy property most frequently found within a country. Chief Justice Marshall asserts that there is no distinction in reason between debts and credits and other forms of property. In the *Brown Case, supra,* at p. 123 of 8 Cranch, p. 509 of 3 L. Ed., he says:

"Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction."

Brown v. *U. S.* was decided in 1814. The case of *U. S.* v. *Percheman* came before the court in 1833 and again the majority opinion is written by Marshall, and in it he says, concerning the results upon private property of the transfer of dominion:

> "It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. *The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled.* (Italics ours.) (*U. S.* v. *Percheman*, 7 Peters 51, at foot of p. 86; 8 L. Ed. 604, at p. 617.)

In 1846 Congress, in declaring the existence of a state of war with Mexico, (9 Stats. at Large, p. 9) omitted any specific reference to the treatment of enemy property, and a United States District Court, following the *Brown case* (*supra*) refused to condemn an enemy vessel found in an American port, holding that such private property was under the protection of American law (*The Juanita*, Newberry, p. 352).

Of course it is not contended, in view of the difference in facts between the cases, that any of the cases just cited constitute strict legal precedent in the instant case. All that is contended is that these cases prove that the *policy* of the United States is so opposed to confiscation that he who claims that confiscation is intended in a given case is put upon proof to support his claim.

In further support of this contention it may be pointed out that the only acts of Congress which have been held to be confiscatory of enemy property were Acts

which declared in their title the purpose of confiscation and in their body provided for carrying this purpose into effect. These were the so-called Civil War Confiscation Acts. These are the Acts of August 6, 1861 (12 Stat. at L., p. 319) and July 17, 1862 (12 Stat. at L., p. 589).

These will be noticed more at length hereafter. For the present they are referred to only for the purpose of pointing out that the argument that the Joint Resolution of May 12, 1917, here in question, is not a confiscatory measure, is strengthened by the fact that Congress, at a time when it desired to enact a confiscatory law, did enact it in terms as plain and certain as those employed in the Act of July 17, 1862. We submit that it is a notable circumstance that on the one occasion when our Government departed from its policy of declining to confiscate the property of enemies, it expressed its departure from that policy in the plainest possible terms.

The greatest contemporary American authority on International Law is Mr. John Bassett Moore, who was for many years and until recently the adviser of the State Department on such matters. At p. 308 of Vol. 7 of his Digest of International Law, Mr. Moore, after reviewing numerous authorities, says:

> "Finally, without unnecessarily multiplying authorities on a point which is undisputed, we may quote from Hall the following passage:
>
> " 'Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, *may be said to enjoy a practical immunity from confiscation.*' "

As further proof that the Civil War Confiscation Acts are mere exceptions to a general rule and that the ancient American policy of non-confiscation remains the policy of our Government at the present day, we quote

the following extract from the speech delivered by Charles E. Hughes, then Secretary of State, at Philadelphia on November 30, 1923. Referring to Latin America, he said:

> "States have duties as well as rights. Every State on being received into the family of nations accepts the obligations which are the essential conditions of international intercourse. Among these obligations is the duty of each State to respect the rights of citizens of other States which have been acquired within its jurisdiction in accordance with its laws.
>
> "A confiscatory policy strikes not only at the interests of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful co-operation is possible.
>
> "Each State may have its code of laws in accordance with its conception of domestic policy, *but rights acquired under its laws by citizens of another State it is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles.*" (Italics ours.)

In the concluding paragraph the Secretary of State only repeats in other words the thought expressed by Hamilton when ("Camillus Letters" XVIII) he denounced

> "The idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation."

And when ("Camillus Letters" XIX) he asserted that:

> "Whenever, therefore, a Government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security."

The Government, when prosecuting the case of *U. S.* vs. *Chemical Foundation* (294 Fed. Rep. 300) held the opinion here expressed that confiscation of enemy property is contrary to the policy of the United States. From the brief of the Attorney-General filed in that case in the U. S. District Court we quote as follows:

> "* * * Confiscations of the private property of the enemy have met the universal disapprobation of the civilized world for nearly two hundred year." (p. 156.)
>
> "9. It is to be presumed that Congress, by the amendment of March 28 (to the Trading with the Enemey Act), did not intend to violate the 'law of nations' by authorizing confiscation of enemy property, unless the act clearly so directs." (p. 196.)
>
> "That public opinion of the civilized world has been against the confiscation of private property of the enemy in time of war for at least two centuries, up to the termination of the World War, is universally recognized." (p. 198.)
>
> "With the growth of Christianity, the practice of enslaving the defeated enemy gradually disappeared, but the practice of seizing his property continued. It early developed that the seizure must inure to the benefit, not of the individual members of the victorious army, but to the sovereign power of the nation. Then with the growth of commercial intercourse and with the

progress of civilization, the idea that both the person and the property of the individual enemy was free from confiscation, although both might be arrested or impounded as a measure of safety during the war developed." (p. 202.)

"* * * The policy of the United States and the modern policy of all civilized nations has forbidden the exercise of the power, which is admitted to exist in Congress, to confiscate alien property seized on land outside of the military zone in time of war." (p. 574.)

Although the references in the brief just quoted are to property *on land*, the modern tendency among civilized nations is to accord the same treatment to enemy ships tied up in the ports of a country on the outbreak of hostilities. This attitude is reflected in Articles 1 and 2 of the Sixth Hague Convention (1907), which read as follows:

"Article 1. When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

"The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

"Article 2. A merchant ship unable, owing to circumstances of *force majeure*, to leave the enemy port within the period contemplated in the above article or which was not allowed to leave, can not be confiscated.

"The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war or requisition it on payment of compensation."

It may be said that the reference to the Hague Conventions is not to the point because the American delegation did not sign this particular one. *The refusal to sign, however, was based upon their view that the articles in question did not go far enough to express what had already become an absolutely binding obligation so far as the United States was concerned.* The report of the American delegation on this point is printed in full in Foreign Relations, 1907, at p. 1158.

And, as the practice of governments serves to illustrate the conceptions of law which they hold, it may be useful to observe that neither at the outbreak of the war between the States nor at the outbreak of the Spanish War was any impediment offered to ships owned and registered in the Confederate States in the one case, or in Spain in the other, freely departing.

C. The joint resolution of May 12, 1917, gives no evidence of an intent to confiscate the enemy property referred to therein, but on the contrary clearly indicates a lack of such intent, as appears from the following:

1. The term "confiscation" or its equivalent is not used in the Joint Resolution.

This fact is of great weight when it is recalled that Congress, if it had desired to enact a confiscatory measure, had before it a precedent in the Act of July 17, 1862 (12 Stat. at L., p. 589), entitled "An Act to suppress insurrection, to punish treason and rebellion, to *seize and confiscate* the property of rebels, and for other purposes," which act had been held constitutional by a

majority of the Supreme Court. *Miller* vs. *U. S.*, 11 Wall. 268.

As pointed out above, it is not permissible to *presume* an intention to confiscate. We respectfully submit that with the Civil War precedent before it, if Congress had *intended* a confiscation of this ship property it would not have failed to use the word "confiscate," or a word expressive of that meaning, in either the title or the body of the Joint Resolution.

2. The language of the Resolution is merely permissive and not mandatory.

The manifest purpose of the act was to provide the United States with facilities if needed, by enabling the Government (a) to acquire "immediate possession and title" of any vessel affected by the Joint Resolution, and (b) to "operate, lease, charter and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise." (So far as coastwise service is concerned, the Resolution was a necessary enabling measure. Without it these ships, being foreign-built, could not have been operated coastwise. See Act of August 18, 1914, c. 256, sec. 1, 38 Stat. 698.) The President is not *directed* or *required* to take title. He is simply *authorized* to do so. So, also, he is simply *authorized*, not directed or required, to put the ships into service. If in the exercise of his own judgment he had refrained from taking title, or, after taking title had refrained from putting the ships into service, it could not be said that he had violated any mandate imposed upon him by Congress; so likewise if he had taken some ships and refrained from taking others (as a matter of fact the records show that he took some at one time and others not until a later date).

In all this it is apparent that the acquisition of facilities was the purpose in view, and that there was no

thought of injuring, coercing or punishing any person or interest, for had such an intention been present the authority given to the President would have been mandatory and not merely permissive.

3. The Resolution authorizes the seizure of others besides enemy-owned ships.

The powers granted by the Resolution are so broad as to apply not only to ships then enemy owned (*i. e.*, German owned—we were not yet at war with any other nation), but to ships then owned by the nationals of friendly neutrals, of governments associated with us in the war, and even by American citizens themselves. The condition which subjected a ship to expropriation under the Resolution related to her ownership, flag or registry at the time she came into our jurisdiction (*i. e.*, with regard to appellant's ships, July-August, 1914). German ownership *at that time of the smallest share or fractional interest* subjected the whole ship in 1917 to the exercise of the powers granted the President by the Resolution, regardless of where the ownership might lie in 1917. The same is true as to flag or documentation, regardless of ownership. If these were German in 1914 the ship was subject to expropriation in 1917, regardless of changes in flag or documents in the interim.

By way of showing the broad scope of applicability of this Joint Resolution we refer to certain illustrative instances. German ships coming here in 1914 were purchased by Americans in 1915 under authority of an act of Congress of August 18, 1914 (c. 256, sec. 1; 38 Stat. at L. 698), and put under American registry and sent out as merchant ships. (See Life and Letters of Walter H. Page, by Burton J. Hendrick, published by Doubleday, Page & Co., 1922, vol. 1, pp. 392-394, referring to the "Dacia.") Such vessels as the "Dacia," had she not

been captured as prize, as she was by the French before we entered the war, would have been subject to expropriation under the Resolution. In another case now before this Court there are involved three vessels taken under the terms of this Joint Resolution, although they had been American owned and under American registry and flag since 1913 (*Atlas Line S. S. Co.* v. *U. S.*, case No. 477, October Term, 1924).

The Austrian steamer "Martha Washington" was requisitioned on August 31, 1917, although no state of war then existed between the United States and Austria. Later (May 11, 1918) title was taken under the Resolution. The United States afterwards paid compensation for her use down to the date of taking title, although, for a part of the use period (*i. e.*, December 7, 1917—May 11, 1918) we were actually at war with Austria. See Record of Hearings before House Committee on Merchant Marine, 66th Congress, 3d Session, December 15, 1920, re bill H. R. 14985. See also Minutes of U. S. Shipping Board of April 16, 1920, for Resolution re Compensation for S. S. "Martha Washington," which is of such importance that we quote it in full as follows: (Italics ours.)

> "WHEREAS, On August 31, 1917, the United States Shipping Board requisitioned the vessel MARTHA WASHINGTON, a passenger steamship of 8312 tonnage, then owned by Cosulich Societa Triestina di Navigazione, a corporation organized in Trieste, Province of Litorale, Austria; and
>
> "WHEREAS, At the time of said requisition, the MARTHA WASHINGTON *had Austrian registry and flew the Austrian flag,* and was lying at the port of New York; and
>
> "WHEREAS, The said Cosulich Societa Triestina di Navigazione claims to be in fact an Italian Corporation, and seeks to have the said MARTHA

WASHINGTON reconveyed and recover compensation for its use while under the jurisdiction of the United States; therefore be it

"Resolved, That at the time the MARTHA WASHINGTON was requisitioned said vessel had the status of a *neutral vessel subject to requisition* by the United States Shipping Board under the power delegated to said Board by the President of the United States, which authority was vested in the President by an act of Congress, the Board has no authority to reconvey the said vessel to the Cosulich Societa Triestina di Navigazione, regardless of whether or not said corporation may at the present time be entirely Italian in character and purpose; and be it

"Further resolved, That the *claimants be remitted to the State Department to establish their Italian citizenship* as a prerequisite to the delivery of the vessel and compensation therefor after May 11, 1918; and be it

"Further resolved, That the recommendations of the Requisition Claims Committee that the award of compensation for the use of said vessel during the period it was in use under the Requisition Order of August 31, 1917—from August 31, 1917, to December 7, 1917, be fixed at $219,436.80, from which should be deducted the cost of repairs effected by the United States Navy, and the time required to make same, and further, that *just compensation for the use of said vessel from December 7, 1917, until the United States took over possession and title of said vessel on May 11, 1918, in accordance with Executive Order No. 2859-A be fixed at $352,013.20,* be, and they are hereby approved; and be it

"*Further resolved*, That the Disbursing Officer of the United States Shipping Board be, and he is hereby authorized *to pay the amount awarded to the claimant* upon securing the consent of the Alien Property Custodian thereto; and be it

"*Further resolved*, That pending receipt of information from the Navy Department with respect to the cost of the repairs and the time required to effect the same, the claimant be required to guarantee the payment thereof; and that the State Department be advised of this guarantee in order that it may be enforced before redelivery of the MARTHA WASHINGTON is effected, in the event the claimant establishes his right thereto."

We refer to this situation at such length for the support it lends to the following observations:

(a) The fact that the Resolution authorized the United States to take title to neutral, allied and American-owned and registered vessels, no less than German-owned vessels, leads inevitably to the conclusion that it was intended that such vessels should be paid for. It is impossible to hold that Congress intended to authorize the taking of the ships of a neutral, an ally or a citizen without compensation. It is equally impossible for the court to apply one rule to the ships of such persons and another rule to enemy ships. To make such a distinction would lie only in the power of Congress, and Congress has laid down one rule for all.

(b) The Executive Department of the Government has recognized that no distinction was made between enemy and non-enemy ships, in paying the sum of $352,000 for the use of the Austrian ship, "Martha Washington," from the date of the declaration of war with Austria on December 7, 1917, to the

date when title to the ship was taken on May 11, 1918. (See Shipping Board Resolution, *supra*.)

(c) Recognition of the right of the owners of the "Martha Washington" to be paid compensation for her use during that part of the period of the war with Austria that preceded the taking of title, constitutes an admission of their right to recover compensation for the property of which they were deprived when *title* was taken. Reason and justice do not justify taking a *title* without compensation, when the right to be compensated for *use* prior to the taking of title is recognized. Of course, also, if Austrian enemies are entitled to be compensated, German enemies are equally entitled. No ground exists for distinguishing between the two, and if power to make an arbitrary distinction may be claimed to exist anywhere, it could be only in Congress, which has not attempted any distinction.

One feature of the Martha Washington case deserves special mention. It was admitted that the ship was of Austrian flag and registry, that the corporation owning her was an Austrian corporation and that its managing directors and majority stockholders were Austrian subjects. It was asserted, however, that the corporation was organized and controlled "by those who were of Italian blood and Italian sympathy, although underlying that they were subject to the domination of Austria until this portion of Italia Irredenta was redeemed" (Report of House hearing, *supra*, especially page 5; Shipping Board Resolution, *supra*). The Shipping Board resolution shows that this claim was treated as immaterial in the making of the award for compensation. The Resolution orders: "that the claimants be remitted to the State Department to establish their Italian citizenship as a prerequisite to the de-

livery of the vessel and compensation therefor after May 11, 1918" (*i. e.*, after date of taking title). And, entirely disregarding this claim and dealing with the steamer as an Austrian vessel, the Board found: "that just compensation for the use of said vessel from December 7, 1917, until the United States took over possession and title of said vessel on May 11, 1918, in accordance with Executive Order No. 2859-A be fixed at $352,013.20 * * *." That is to say, the Board awarded compensation for the use of the vessel during that part of the Austrian war period which preceded the taking of title, although conceding that she was an Austrian—hence, enemy-owned ship.

(No distinction exists between a "requisition" and a "condemnation." Judge Smith in the U. S. District Court for the Eastern District of South Carolina in *Filbin Corporation* v. *United States*, 266 Fed. Rep. 913, referring to the language of the Fifth Amendment said:

> "Nothing is said about 'requisition' or 'condemnation'; the word used is 'taken.' The result of either condemnation or requisition is *a taking*, and therefore, in the opinion of the court, this amendment applies to the taking of private property, whether it be by requisition or by condemnation; and both requisition and condemnation being exercised by virtue of the same provision of constitutional law, commonly called 'eminent domain,' which allows the interest of the individual to be subordinated to that of the public and private property to be taken compulsorily for public use, in the opinion of the court, under the Constitution of the United States, there is no difference between a 'requisition' and a 'condemnation,' so far as the obligation of the United States is concerned, to award to the owner just compensation.")

4. Claims for compensation are contemplated by the language of the Resolution.

Section 2 of the Joint Resolution reads as follows:

> "Sec. 2. That the Secretary of the Navy be, and he is hereby authorized, and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

A "claim," in a judicial sense, has been defined by this Court to be "a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty". (*Prigg* vs. *Penna.*, 16 Peters 539, 615). The plural word "proceedings" is defined by Webster (New International Dictionary, Merriam 1918) as "a. The course of procedure in an action at law; b. Any step or act taken in conducting litigation".

It must be assumed that Congress, in framing legislation, chooses words advisedly and with a due sense of their values and their aptness to express the legislative purpose. The use of the terms "proceedings" and "claim" show conclusively that Congress contemplated that demands for compensation would be asserted *as a matter of right* by appropriate judicial proceedings. Moreover, how absurd it would have been to provide that the appraisal referred to in the Resolution should be

competent evidence in certain proceedings, if those proceedings were not themselves to be permitted.

5. Statements made by Members of Congress and public officials indicate a belief that the Joint Resolution did not intend the confiscation of enemy ships.

When the utterances of members of Congress in regard to a pending measure indicate conflicting views as to its meaning and intent, such utterances do not afford a satisfactory guide to its interpretation (*United States* vs. *Trans-Missouri Freight Ass'n.*, 166 U. S. 390); but when the debates in Congress show a unanimity of opinion in the views expressed by its members, there is suggestive strength in that fact (*Banco Mexicano* vs. *Deutsche Bank*, 263 U. S. 591, 602); and the records of Congress, as well as the history of an enactment and the situation which existed at the time of its passage, will be considered by this Court in determining its true meaning (*Holy Trinity Church* vs. *U. S.*, 143 U. S. 457, 463; *Blake* vs. *National Banks*, 23 Wallace 307; *Buttfield* vs. *Stranahan*, 192 U. S. 470, 495; *Texas & Pac. R'y. Co.* vs. *Interstate Commerce Comm.*, 162 U. S. 197).

In the case at bar, every member of the House of Representatives who spoke in the debates on the Joint Resolution of May 12, 1917, indicated a belief that compensation for the seized ships was contemplated by that measure. Among the more significant of these utterances were the following:

Mr. Rowe of New York, speaking of the seizures authorized by the Joint Resolution, said (Cong. Rec. May 7, 1917, p. 1919):

> "Such seizures are made in most of the States of the Union, and afterwards they settle the bill. We even take real estate in my State and afterwards condemn the property and find the value. It is done when the real estate is wanted and wanted

immediately. Here is something that we want. We must have ships that can carry freight and soldiers from this country and Canada to Europe.

"There is no man in this House to-day that wants us to take advantage of the private citizens of the United States or the private citizens even of Germany. They must and will be paid. We do hold, however, that no money that is paid for these vessels should be transferred to any German citizen or to the German Government *before this war is closed."*

Mr. Stafford of Wisconsin said (*Ibid,* p. 1919):

"I fully approve of the policy that is provided for in this bill for the Government to appropriate these foreign interned ships; but I also wish to advocate the duty of the Government to pay those rightful owners, whoever they may be, for the use of those ships."

Mr. Stafford also said (*Ibid,* p. 1919):

"That principle is akin to that providing compensation for these interned ships; that being interned here, the owners not having the privilege of leaving port except by rushing into the jaws of destruction, are entitled to have their rights conserved and recognized in the courts of this country. And I make this claim, that if Germany accords to our citizens in their courts the same right to sue the Government as is accorded aliens in the Court of Claims, if she accords them reciprocal rights, then these foreign subjects, upon the seizure of their property, have the right to go into the Court of Claims and prosecute their claim for indemnity or for the return of the property."

Mr. Bankhead of Alabama interrupted Mr. Stafford (*Ibid*, p. 1920) to ask whether the Joint Resolution involved a denial of the principle that compensation should be paid. Mr. Stafford replied (*Ibid*, p. 1920):

> "The bill provides, in section 2, for the means whereby the Secretary of the Navy may appraise the property that is taken over and says that that appraisal shall be considered as competent evidence in all proceedings hereafter authorized in any claim for compensation. That rather presupposes that some person somewhere will make a claim for damages."

Mr. Hardy of Texas remarked (*Ibid*, p. 1921):

> "This bill simply sets in motion the power of eminent domain of the Government to take the property of an alien or of a citizen, and the Government has the right in a case of public necessity arising from war to take over the property of its own citizens, and certainly no less the property of any other resident human being within its borders."

Mr. Small of North Carolina said (*Ibid*, p. 1922):

> "I am in favor of this bill which appropriates the interned ships of Germany, with which we are at war. I think it can be justified upon the ground of emergency and necessity, but at the same time I do not believe there should remain the slightest question that there should be compensation to the owners of these ships to the extent of their value as of the present time."

Mr. Edmonds of Pennsylvania remarked (*Ibid*, p. 1923):

> "We take the ships. We have arranged to leave the question of compensation open. The

> treaty is here. Undoubtedly all those questions will be brought up when this case will be adjudicated in the Courts of Claims, where they have a right to take it."
>
> * * * * *
>
> "I think we can afford to pass this resolution and leave it to the court to pass upon in due time what we are to pay for these ships."

Mr. Hadley of Washington, speaking of the appraisal provided for by Sec. 2, said (*Ibid*, p. 1924):

> "It is to be preserved, and to be submitted in any court of competent jurisdiction that may deal with that subject. That is expressly provided by the resolution."

The entire debate is set forth on pages 1903 to 1932 of Vol. 55, Part 2 of the Congressional Record. A study of this debate shows that it gives full support to the following propositions:

(a) That Congress *intended* that the ship owners affected by the Joint Resolution, enemy no less than neutral, should be compensated for their seized ships.

(b) That the opinion was held, with practical unanimity, that the Resolution as passed gave rise to an absolute right to compensation.

(c) That such differences of opinion as existed had reference only to the questions of the time of payment and of the manner in which the compensation ultimately to be paid should be determined, and the tribunal for establishing the proper amount.

(d) That a respectable body of opinion among the Legislators—of course it is impossible to determine whether or not a majority—clearly believed that the Joint Resolution, without anything more, was suf-

ficient in itself to give the Court of Claims jurisdiction to determine the amount.

The belief that the Joint Resolution contemplated the payment of compensation was not confined to members of Congress. The State Department, over the signature of Van S. Merle-Smith, and under date of December 8, 1920, addressed to Senator Lodge, Chairman of the Foreign Relations Committee of the Senate, a letter relating to the Austrian steamship "Martha Washington." This letter was used by the Hon. Charles E. Hughes, afterward Secretary of State, in his argument addressed to the House Committee on the Merchant Marine and Fisheries, 66th Congress, 3d Session, December 15, 1920, and is printed in full in the record of said hearing. In this letter Mr. Merle-Smith said:

> "The joint resolution of May 12, 1917, which authorized the seizure of the vessel, contemplates the payment of compensation."

The record of the above-mentioned hearing also contains on p. 17 the following colloquy between Mr. Hardy of Texas, a member of the Committee, and Mr. Hughes.

> "Mr. Hardy— * * * As I understand it, under international law, the private property, and justly so, of a private citizen of a country which may get into war with us, is really sacred.
>
> "Mr. Hughes—And ought to be."

D. If the taking of appellant's ships did not constitute a confiscation of them, they must have been taken by an exercise of the sovereign right of eminent domain, and appellant is entitled to compensation.

When a sovereign power seizes private property within its jurisdiction, it must either confiscate such property or take it by virtue of the right of eminent

domain possessed by every sovereignty—that is, the right to take the ownership and possession of private property for a public use. There is no third alternative method—no vague, indefinite kind of taking by which a Government can acquire the title to private property.

The right of eminent domain attaches to every species of property within the territorial jurisdiction of a sovereign Government (20 Corp. Jur. 587). It applies to the property of aliens as well as to that of citizens, for no alien is granted a greater or more favorable tenure of property than is permitted to citizens. In time of peace the Government of the United States could have exercised this power with respect to appellant's property; and certainly the outbreak of war did not lessen its rights with regard to such property.

It is believed that the preceding parts of this brief have established the proposition that the Government of the United States did not confiscate, nor intend to confiscate, appellant's ships. It must follow that they were taken by an exercise of the right of eminent domain; and the exercise of that right carries with it the obligation to make compensation for the property so taken.

Few legal propositions are more firmly established than this one. In the case of *Langford* vs. *United States*, 101 U. S. 341, this Court declared:

> "We are not prepared to deny that when the Government of the United States, by such formal proceedings as are necessary to bind the Government, takes for public use, as for an arsenal, custom-house or fort, land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value."

and,

> "This right to compensation follows from the two propositions, that it was private property and

was taken for public use, neither of which is disputed."

In the case just cited the plaintiff sued in the Court of Claims to recover for the use and occupation of lands and buildings to which both the plaintiff and the United States claimed title. Both the Court of Claims and this Court decided against the plaintiff solely on the ground that the Government claimed that it was dealing with its own property, and recognized no title superior to its own; holding that if in such a case it is made to appear that actual title is in the plaintiff the acts of the agents of the United States in holding possession are mere torts.

The doctrine stated by the Court in the *Langford Case*, that if the United States takes property without a claim of title, the owner thereby becomes entitled to compensation, is recognized and expressly applied in the case of *U. S.* v. *Lynah*, 188 U. S. 445, 47 Law Ed. 539. In that case, the claim being for only $10,000.00, the matter was within the jurisdiction of the Circuit Court and suit was brought in the Circuit Court for the District of South Carolina, based on an implied contract for compensation for the value of property taken by the United States for public use. The facts were that the United States, in making improvements to the channel of the Savannah River, built dams that caused valuable rice lands of the plaintiff to be flooded, so as to render them impossible of cultivation and destroy their value. The case was tried by the Court without a jury and the Court found the facts to be as before stated and thereupon gave judgment for the plaintiffs for $10,000.00. The United States carried the judgment to this Court for review on writ of error.

Mr. Justice Brewer, writing the majority opinion, stated that three principal questions were involved in the case. First, did the Circuit Court have jurisdiction?

second, was there a taking of the land within the meaning of the Fifth Amendment? and, third, if there was a taking, was the Government subject to the obligation of making compensation therefor? Each of these questions was decided in the affirmative. For present purposes we are concerned only with the decision of the third question.

Upon this third question the Court said (at p. 471 of 188 U. S., p. 549 of 47 Law Ed.):

> "But if any one proposition can be considered as settled by the decisions of this Court it is that, although in the discharge of its duties the Government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

And, earlier in the opinion, after having discussed numerous preceding cases, the Court speaks as follows (p. 465 of 188 U. S., p. 546 of 47 Law Ed.):

> "The Government may take real estate for a postoffice, a courthouse, a fortification, or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

While three judges dissented from the majority opinion, their dissent is based upon the view that, as a *matter of fact*, the property had not been taken, because by means of embankments and pumps the flowing of the

lands could have been prevented. Of course, dissent on such grounds does not imply that the dissenting judges took exception to the legal principle laid down by the Court, that where a taking actually occurs the right to compensation follows.

One of the preceding cases on which the Court based its decision in the *Lynah Case* was that of *U. S.* v. *Great Falls Manufacturing Co.* (1884), 112 U. S. 645; 28 Law. Ed. 846. In the *Great Falls Case,* the plaintiff sued and recovered judgment in the Court of Claims for the past and future use and occupation by the United States of certain lands owned by the company and taken possession of by the United States in the execution of a plan for supplying the City of Washington with water. The United States did not assert any title to the lands claimed by plaintiff. The lands in question were occupied by a dam, or its abutment, constructed pursuant to an act of Congress. The Government commenced, but later abandoned, proceedings to condemn the lands, and simply took and held possession of them without acquiring title. The Court distinguished this case from the *Langford Case* (*supra*) upon the ground that here the title of the plaintiff was not disputed. This Court affirmed the judgment of the Court of Claims in favor of the plaintiff, and in doing so said (foot of page 656 of 112 U. S., column one of page 850 of 28 Law Ed.):

> "* * * we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an im-

plication being consistent with the constitutional duty of the Government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States."

In *De Camara* v. *Brooke* (1905), 135 Fed. 384 (at page 390), Judge Holt, in the U. S. District Court for the Southern District of New York, citing the *Great Falls Manufacturing Co. Case* and the *Lynah Case,* makes the following observation concerning their effect:

> "It is well settled in this country that if the Government, in violation of the provisions of the Constitution, takes private property for a public use, without compensation, a cause of action arises against the Government upon an implied contract to pay for it."

In 1914 this Court reaffirmed the principle that when the Government takes property to which it asserts no title, the implied obligation arises to make compensation for it. In *U. S.* v. *Buffalo Pitts Co.,* 234 U. S. 228; 58 Law Ed. 1290, plaintiff, a manufacturer of machinery, sold an engine to a contractor on Government work and took a chattel mortgage to secure part of the purchase price. The contractor defaulted in the work and the Government took over the completion of the contract, taking possession of the engine as part of the machinery on the job. The plaintiff notified the representative of the United States of the existence of the chattel mortgage and that plaintiff claimed the property under the title vested in it by the chattel mortgage and claimed the right of possession because of the mortgagor's default.

The United States refused to surrender the engine to plaintiff and its agent reported to plaintiff that any legal proceedings to recover possession would be resisted, but that if the engine was left in the possession of the United States, its attorney would recommend that it be paid for. Thereupon plaintiff permitted the United States to retain possession, but, payment not having been made, brought suit to recover for the value of the engine. The claim being for less than $10,000.00, suit was brought in the District Court. The United States defended on the ground that the claim was based on tort and that there was no implied contract. Both the District Court and the Circuit Court of Appeals gave judgment in favor of the plaintiff and the United States appealed to the Supreme Court. This Court, as well as the courts below, found that as a matter of fact the United States did not assert ownership of the engine, although it did properly claim a right to take and use it. The Court quotes with approval from its former majority opinion in the *Lynah Case* as follows:

> "The rule deducible from these cases (*i. e.*, prior to the *Lynah Case*) is that when the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates."

And reasserting the rule in its application to the case then before it says (at the foot of page 235 of 234 U. S., second column of page 1293 of 58 Law Ed.):

> "While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation. When it takes property under such circumstances for an authorized governmental use,

it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this Court, and arises because of the Constitutional obligation embodied in the Fifth Amendment to the Constitution of the United States, guarantying the owner of property against its appropriation for a governmental use without compensation."

The principles enunciated by this Court in the decisions referred to above have recently been re-affirmed by it in two cases growing out of seizures of property during the recent war, which seem particularly applicable to the case at bar. These cases are

A. W. Duckett & Co. vs. *U. S.*, 45 Sup. Ct. Rep. 38

and

Campbell vs. *U. S.*, 45 Sup. Ct. Rep. 115.

In the *Duckett* case the President, pursuant to authority given him by the Act of Congress of Aug. 29, 1916, c. 418 (39 Stat. 619, 645) took possession through the Secretary of War of the Bush Terminal in Brooklyn, New York. The claimant, a lessee of one of the seized piers, was dispossessed and brought suit in the Court of Claims for the value of his leasehold, relying on a general order issued by the Secretary of War that steps would be taken to ascertain the fair compensation to be paid by the Government for the use of the premises. The petition was dismissed by the Court of Claims for want of jurisdiction, on the ground that no contract could be implied to pay for the value of a leasehold (58 Ct. Cls. 234, 403).

This Court reversed the decision of the Court of Claims, saying (p. 38):

"We can see no ground for attributing to the United States the extraordinary intent to recog-

> nize and pay for other interests but to exclude the claimant. The order made no such distinction but promised fair compensation, seemingly to all, and the subsequent appointment of a board of appraisers contemplated payment to tenants."

and on page 39:

> "Here the claimant's possession under its lease was a part of the res, and therefore was within the implied promise to pay. Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims. United States *v.* North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

The facts in the *Campbell* case are set forth in the opinion of this Court as follows (p. 116):

> "In 1918 the United States, to aid in the prosecution of the war, had determined to build a nitrate plant at Ancor in the Little Miami valley, near Cincinnati, Ohio. In order to get a site, it had taken possession of many parcels of land making up a large tract, adjoining plaintiff's estate of 69.73 acres. August 31, 1918, an officer of the army, acting under the direction of the Secretary of War, and without obtaining plaintiff's consent or instituting condemnation proceedings or making any compensation therefor, took possession of a part of plaintiff's land."

The Government did not contest plaintiff's right to compensation, the only question in dispute being whether he was entitled to be compensated for a diminution in value of the remainder of his property caused by the

use to be made by the Government of other lands acquired for the same purpose. On this question this Court decided against plaintiff, but on the general principle to be applied in such cases used this significant language:

> "The taking was under the sovereign power of eminent domain. The President and Secretary of War were authorized to purchase or condemn the lands. Act June 3, 1916, c. 134, §124, 39 Stat. 215 (Comp. St. §3110b); Act July 2, 1917, c. 35, 40 Stat. 241, as amended April 11, 1918, c. 51, 40 Stat. 518 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §6911a). And from the taking there arose an implied promise by the United States to compensate plaintiff for his loss. United States *v.* Great Falls Mfg. Co., 112 U. S. 645, 656, 5 S. Ct. 306, 28 L. Ed. 846; United States *v.* Lynah, 188 U. S. 445, 464, 23 S. Ct. 349, 47 L. Ed. 539; United States *v.* Cress, 243 U. S. 316, 329, 37 S. Ct. 380, 61 L. Ed. 746; United States *v.* North American Co., 253 U. S. 330, 333, 40 S. Ct. 518, 64 L. Ed. 935. Thereupon he became entitled to have the just compensation safeguarded by the Fifth Amendment to the Constitution; that is, the value of the land taken and the damages inflicted by the taking—such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken. Seaboard Air Line Railway Co. *v.* United States, 261 U. S. 299, 304, 43 S. Ct. 354, 67 L. Ed. 664."

E. The fact that appellant was an enemy alien did not deprive it of the constitutional right to compensation for its property taken for a public use.

The only ground on which the proposition stated above could conceivably be attacked is that the appellant

is a corporation created by a sovereignty with which the United States, at the time of the taking, was at war.

The right which the appellant asserts is derived from the Fifth Amendment, the applicable provisions of which read as follows:

> "Nor (shall any person) be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In interpreting these provisions the courts have consistently held that the due process clause protects corporations in their property, notwithstanding that it is only a natural person who can be deprived of life or liberty. Concerning this clause, it is remarked at p. 413 of 11 Fed. Stats. Ann. that

> "A similar provision is found in nearly all of the State statutes; and everywhere, and at all times, and in all courts, it has been held either by tacit assertion or express adjudication, to extend, so far as their property is concerned, to corporations."

This quotation is taken from the opinion of Field, J., in *The Railroad Tax Cases*, 13 Fed. R. 722 at 746 (C. C., D. Cal., 1882), in which opinion the Court also states, after quoting the Fifth Amendment, as follows:

> "From the nature of the prohibitions in this amendment it would seem, with the exception of the last one, as though they could apply only to natural persons. No others can be witnesses; no others can be twice put in jeopardy of life or limb, or compelled to be witnesses against themselves; and therefore it might be said with much force that the word 'person,' there used in connection with the prohibition against the deprivation of life, liberty, and property without due process of law, is in like manner limited to a natural person.

But such has not been the construction of the courts."

And in the following cases the Courts of the United States have held the due process clause to be applicable to the property of corporations:

San Mateo v. *Southern Pacific R. Co.*, 13 Fed. R. 145 (C. C., D. Cal. 1882) on page 151.

County of Santa Clara v. *Southern Pacific R. Co.*, 18 Fed. R. 385 (C. C., D. Cal. 1883) on page 404; affirmed on other grounds in 118 U. S. 394; 30 Law. Ed. 118.

Constantine J. Smyth, Attorney General et al., v. *Oliver Ames et al.*, 169 U. S. 466, at p. 522; 42 Law. Ed. 819, on page 840.

United States v. *McHie et al.*, 194 Fed. R. 894 (D. C., N. D. Illinois, E. D. 1912), on page 898.

So, also, the clause forbidding taking private property for public use without compensation has been held to extend to corporate owned property. In *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 37 Law. Ed. 463, this Court held that the United States was required to pay for the value of a franchise to take tolls, granted to a corporation by a state, where the United States had condemned the physical property of the corporation for the improvement of the navigation of public navigable interstate waters, although the Act of Congress authorizing condemnation provided, "In estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated."

In the light of these authorities it cannot be maintained that the appellant is barred from the right to compensation merely because it is a corporation.

In like manner the due process clause has been held to apply to an *alien*, the specific application being that the Act of Congress of May 5, 1892 (27 Stat. at L. 25), authorizing the imprisonment for one year of a Chinese alien, for the offense of being unlawfully in the United States, was held to violate the due process clause by authorizing conviction before a commissioner, without trial by jury. *Wong Wing* v. *United States*, 163 U. S. 228, 41 Law. Ed. 140. In this case the Supreme Court, applying the principle of an earlier decision which turned upon the provision of the Fourteenth Amendment restraining the States from denying due process of law said (p. 238 of 163 U. S., p. 143 of 41 Law. Ed.):

> "The 14th Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws. Applying this reasoning to the 5th and 6th Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."

The only remaining ground for attacking appellant's right to compensation is that it was an *enemy* alien when

its property was taken. At first glance it may seem that the so-called "Confiscation Cases" growing out of the Civil War justify such an attack; but analysis will show that those cases did not involve the question here presented, and that their decisive force is apparent rather than real.

The Civil War brought forth two acts authorizing the confiscation of property. They are the Act of August 6, 1861 (12 Stat. at L. 319), and the Act of July 17, 1862 (12 Stat. at L. 589), as explained by the Joint Resolution of July 17, 1862 (12 Stat. at L. 627).

The Act of August 6, 1861, simply provided that property of any kind, used or employed or bought or sold with the intent to use or employ in aiding the Confederacy, should be

> "lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated, and condemned."

Then followed provisions granting jurisdiction to the Circuit and District Courts of condemnation cases and provisions authorizing the United States attorneys to institute condemnation proceedings. The act was characterized by Judge Strong in *Miller* v. *U. S.* (*infra*) as follows:

> "It defined no crime. It imposed no penalty. It declared nothing unlawful. It was aimed exclusively at the seizure and confiscation of property used, or intended to be used, to aid, abet or promote the Rebellion, then a war, or to maintain the war against the Government."

The Act of 1862 was entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other pur-

poses." Its first four sections described the penalties for the crimes of treason and insurrection. It then provided that it should be the duty of the President to cause the seizure of all property belonging to officers of the Confederate army or navy, to officials and agents of the Confederate government, or to persons owning property in loyal states who might thereafter aid the rebellion. It next provided for the seizure of the property of all other persons within the United States then aiding the rebellion who should not, within sixty days thereafter, cease to do so. Finally the Act provided for proceedings *in rem* to secure the condemnation of property to which the Act related.

Coincident with the passage of the Act came the Joint Resolution of July 17, 1862, which as is well known, was passed in order to remove a doubt expressed by President Lincoln that, in the absence of such an interpretation, the principal act might be held unconstitutional. It reads as follows:

> "That the provisions of the third clause of the fifth section of 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,' shall be so construed as not to apply to any act or acts done prior to the passage thereof; nor to include any member of a State legislature, or judge of any State court, who has not, in accepting or entering upon his office, taken an oath to support the constitution of the so-called 'Confederate States of America'; nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

The Act of 1861 extended only to property used or intended to be used to aid the enemy. The Act of 1862

was aimed at the property of those who had violated the allegiance which they owed to the United States. Unquestionably these Acts justified confiscation of enemies' property to the extent which they prescribed, and barred such enemies from the assertion of any rights which the Acts took away. The power of Congress to enact such legislation, then as now, is undisputed. But the fact that it was thought necessary to enact it and to interpret it by a Joint Resolution in order to avoid the suggestion of unconstitutionality, is of immense significance as indicating the belief that without such legislation enemies could not any more than citizens be deprived of their property without compensation.

Quite naturally, none of the cases growing out of the Confiscation Acts discuss the question of what right an alien enemy would have to rely upon the protection guaranteed by the Fifth Amendment *in the absence of such legislation*. As an illustration of the general trend of these cases reference may be made to the leading case of *Miller* vs. *U. S.*, 11 Wall. 268, 20 L. Ed. 135 (*sub nom. Page, Exr.* vs. *U. S.*), cited in the opinion of the Court below. The decision in that case upholds the right of Congress in time of war to seize and confiscate enemy property regardless of the restrictions imposed by the Fifth and Sixth amendments. With this decision the appellant in the case at bar has no quarrel. Unquestionably the confiscation of enemy property is a right possessed by every sovereignty What it is here desired to emphasize as strongly as possible is, that unless the intent to exercise this right is indicated in plain and unmistakable terms (as it was in the Civil War Confiscation Acts) such intent will never be presumed, because it is contrary to the enlightened law of nations and to the traditional policy of the United States.

The distinctions between the legislation just discussed and the Joint Resolution involved in the present case

are many and obvious. In the former, the provisions regarding seizure are mandatory; in the latter they are permissive only. The act of 1861 extended only to property used or intended to be used in aid of the enemy. The Joint Resolution here in question does not make the use or intended use of the ships a criterion of the right of seizure. The act of 1862 rendered property condemnable only in consequence of the personal guilt of its owner. The Joint Resolution here in question in nowise refers to guilt, and, so far as this appellant is concerned, is leveled against property belonging to corporations, which, in the nature of things, could not be guilty of such offenses—treason and rebellion—as those which afford the basis for confiscation under the act of 1862. Furthermore, the corporation appellant in the instant case derived its corporate being not from the United States, but from an independent sovereignty. The act of 1862 provided for the condemnation and sale of seized property. The Joint Resolution here in question contains no such provision, but on the contrary an amendment providing for condemnation was voted down in the Senate (Cong. Record, Vol. 55, Part 2, p. 1575).

Concerning the Civil War Confiscation acts, the Attorney General, at p. 204 of his brief in *U. S.* v. *Chemical Foundation* (*supra*) says: "* * * The purpose of all these acts was to punish American citizens for acts of disloyalty, and although they were later sustained on the doctrine of seizure of enemy property, the legislation cannot be cited as a precedent for confiscation of enemy property during the war just ended."

The Civil War Confiscation cases therefore do not give support to the proposition that the property of a corporate alien enemy, found within the United States, is deprived of the benefit of the Fifth Amendment because of the circumstance of war between the country of its creation and the United States.

It is believed that this precise question has never before been presented to any American court. To attain a correct solution it should be considered from the point of view of both reason and authority. The first ten Amendments to the Constitution were adopted December 15, 1791, having been recommended by the Congress at its first session and under the influence of the framers of the Constitution. Being intended to supply defects in the original instrument, they may be considered practically as a part of the original instrument. The statesmen who framed the Constitution were aware that they were establishing the fundamental law of a country which was already large, and, by reason of its relation to the unsettled remainder of the continent, was doubtless destined to expand; but that, due to the improverishment occasioned by the Revolution and worthlessness of the paper currency, development of its natural resources could not take place unless foreign capital could be attracted. Furthermore, they had witnessed the confiscations of enemy property effected by some of the State Legislatures during the Revolution, and the disastrous results of such a policy.

Franklin, one of the leaders among the founders of the Republic, had himself been a signer of the Definitive Treaty of Peace with Great Britain of 1783 (Treaties and Conventions between the United and other powers, Government Printing Office, 1889, p. 375), which contained the provision (Art. V.) that

> "It is agreed that the Congress shall earnestly recommend it to the Legislatures of the respective states, to provide for the restitution of all estates, rights and properties which have been confiscated, belonging to real British subjects, and also of the estates, rights and properties of persons resident in districts in possession of His Majesty's arms

and who have not borne arms against the said United States."

These facts are eloquent concerning the deliberate intent with which the founders of the Government employed, in the Fifth Amendment, apt language to protect the property of the alien no less than the property of the citizen, and the property of the enemy lawfully here at the outbreak of war no less than the property of a friend. Certainly if a contrary intention had been expressed it would have been impossible to procure funds from abroad for the development of the territories of the new nation. Quite as certainly, in view of the unfortunate experience of British property owners in some of the States, the employment of language which left the matter in doubt would have been equally fatal. The understanding of that time must have been that the Fifth Amendment *extended a protection over all property regardless of its owner.*

Subsequent developments did nothing to disturb this reasonable understanding. Neither in the War of 1812 nor in any of our subsequent wars, except that between the States, was confiscation adopted, and the confiscations incident to the war between the States were, on their face, *based upon the theory that citizens had violated their allegiance.*

Approaching the question from the point of view of authority, we find that Alexander Hamilton in "Camillus Letters" XVIII, says:

> "No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, *in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws,* on account of controversies between nation and nation."

How applicable are these words to the ships of the appellant, which came into our ports, while the United States and Germany were at peace, as ports of refuge or asylum to escape capture by the enemy.

And again ("Camillus Letters" XIX):

> "Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, *or to bring and deposit it there*, it tacitly promises protection and security."

In a speech made by Mr. Hughes, then Secretary of State, on Nov. 30, 1923, he said:

> "Among these obligations is the duty of each State to respect the rights of citizens of other States which have been acquired within its jurisdiction in accordance with its laws."

Most pertinent of all are these words from President Wilson's war message of April 2, 1917:

> "The Government of the United States will in no circumstance take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title."

The arguments under this point may be recapitulated as follows: (1) that the words of the Fifth Amendment, if given their natural meaning, embrace the property of alien enemies which was brought into the United States during peace, no less than the property of citizens; (2) that the circumstances existing at the time of the adoption of the Amendment indicate that such was its intention; (3) that the utterances of our statesmen clearly point to the propriety of such a construction; (4) that no American decision runs counter to such a construc-

tion; (5) that American practice has consistently been in conformity with such a construction.

It is respectfully submitted that in view of these circumstances an American court called to pass upon this precise question for the first time, ought to decide that the alien enemy property owner is entitled to the benefits of the Constitution, and, in deciding otherwise, would run counter to every prior act and word in the history of America which serves to throw any light upon the decision of the question. It would also run contrary to the rule for constitutional interpretation laid down by this Court, which is that

> "* * * constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance." *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312, 37 L. Ed. 463.

Particularly applicable to this discussion of the extent of the application of the Fifth Amendment are the words of the Supreme Court in *Ex parte Milligan*, 4 Wall. 2 (at pp. 120 and 121) (18 L. Ed. 295):

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the Government, within the Constitution, has all the powers granted

to it which are necessary to preserve its existence, as has been happily proven by the result of the great effort to throw off its just authority."

The statement is that its protection covers "all classes of men." This is because it was the right of *personal liberty* which was then in question before the Court. It is inconceivable that the Court would have declared otherwise with reference to *property*, if the question before it had been one of confiscation, not imposed as a punishment for crime or the personal delinquency of the owner.

The Court below states in its opinion (R., 12) that if suits by the German ship owners are authorized, such suits could have been instituted as soon as the President took action under the Joint Resolution of May 12, 1917. It is respectfully submitted that the Constitutional interpretation contended for by the appellant does not lead to or justify any such conclusion. No legal principle is more generally accepted than that alien enemies are barred from resort to the courts of a country while a state of war exists, except in so far as such resort may be necessary to protect their rights when brought into such courts as defendants. What the appellant asserts is a claim, after the close of the war, to the rights guaranteed to it by the Constitution, which continued unimpaired throughout the war, but the exercise of which was suspended while the war continued.

F. Neither the Peace Resolution nor the Peace Treaty bars the appellant from claiming compensation.

Although this point was not touched on by the Court below in its opinion, it was contended by the Government in that Court that the Peace Resolution of July 2, 1921 (the so-called Knox-Porter Resolution) and the Treaty of Berlin "carried into and incorporated in the

substantive law of the United States" the provisions of the Treaty of Versailles, in particular article 297 and the Annex thereto, and that as a result the appellant is barred from asserting any claim to compensation for its ships. For the sake of completeness it therefore seems advisable to discuss this contention briefly, in order to show that it is not well-founded.

As to the Peace Resolution.

This document has so far undergone no judicial interpretation, and, therefore, requires careful examination. In so doing there should be applied first a well settled rule of statutory construction, *i. e.*, that in construing a statute the Court will attempt first to reconcile all its parts, so that each may stand and be given its proper meaning and effect and so that no part shall, unless unavoidable, be treated as a nullity because at first view it seems to be in conflict with some later part. So also in construing two laws or a law and a treaty, one of which is of later date than the other, the same effort must be made, and it is only as a last resort, after reconciliation proves impossible, that the rule will be resorted to that a later statute or treaty supersedes a prior statute or treaty.

Rodgers v. *United States*, 36 Ct. Cl. 266, affirmed in 185 U. S. 83, 46 L. Ed. 816.
Frost v. *Wenie*, 157 U. S. 46;
Walker v. *Lawson*, 275 Fed. 373 and cases there cited.

The effect of this principle is to compel a construction of the Peace Resolution that will permit every section of it to be effective if possible, and will not, for instance, exclude a provision of Section 2 because a provision of Section 5 seems at first glance to run counter to it.

Section 2 provides:

> "That in making this declaration and as part of it, there are expressly reserved to the United States of America * * * any and all rights, privileges, indemnities, reparations or advantages, together with the right to enforce the same * * * to which it is entitled by virtue of any act or acts of Congress, or otherwise."

And Section 5 provides:

> "That all property * * * of all German nationals which was, on April 6, 1917, or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents or employees, from any source or by any agency whatsoever * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until" * * * the German Government shall have performed certain conditions.

One of the *rights* acquired by the United States by *virtue of an Act of Congress*, and which is expressly reserved to the United States by Section 2, is the right (title) of the United States to the ships which it acquired pursuant to the Joint Resolution of May 12, 1917. Nothing could be clearer. The *right* to the ships is derived from the *Act of Congress*. The ships were never put through a prize court, and the only title or evidence of title the United States possesses results from the Joint Resolution and a Proclamation of the President. The important result is that the ships are not a part

of the property of *German nationals* directed by Section 5 of the Peace Resolution to be "retained and no disposition thereof made". The ships are the property of the United States. That the Government itself has taken this position ever since the passage of the Peace Resolution and the adoption of the Berlin Treaty on August 25, 1921, is a matter of public record. Since that time the United States has sold many of the German ships taken under the Joint Resolution of May 12, 1917. The records of the Shipping Board, of the Bureau of Navigation and of the various seaport custom houses where the ships were registered, disclose this fact. To cite one illustrative instance, the United States sold, in *August, 1922,* to the North German Lloyd, the steamer then named the "Pocahontas," now named the "Bremen," and originally named the "Princess Irene," under which name she was taken over by the United States from the North German Lloyd by virtue of the Executive Order of June 30, 1917, made pursuant to the Joint Resolution.

The point here made is of tremendous importance. We assert that by correct principles of statutory construction this ship property is outside Section 5 of the Peace Resolution. Our assertion is supported by the highest possible evidence, that is, the test of contemporaneous construction evidenced by governmental acts.

By another fact, the exclusion of the ships from the retention provision of Section 5 is established. That is, that the property to be retained is the property of *Germans,* which has "come into the *possession* or under *control* of, or has been the subject of a *demand* by" the United States, etc. Considering the meticulous care with which words are employed in framing such solemn documents as Treaties, the mind is *forced* to the conclusion that this phraseology was advisedly devised to *exclude* property *formerly* German owned, but the actual *title* of which, as distinguished from mere possession,

mere control or mere demand without either possession or control had passed to the United States. The lesser cannot contain or comprehend the greater.

The conclusion is irresistible that the words relate to property taken under the Trading with the Enemy Act, by a provision of which, previously quoted, Congress reserved to itself the right of disposition in such manner as it might see fit, after the close of the war; and that they exclude property to which the United States took actual title, such as the ships of claimants.

That this was the belief held by Senator Knox, one of the co-authors of the Resolution, is indicated by his explanation of the purpose of the Resolution made in the Senate on June 30, 1921 (Cong. Record, Vol. 61, p. 3397), in which he said:

> "The language the Senator has in mind *only has reference to the thing that has already been done by the Alien Property Custodian.* The whole theory is this: Speaking for myself personally, *I hope the day is not far away when we shall come back to the traditions of the American people that the right upon land of private property belonging to an alien enemy is a sacred right;* that such property may be taken into custody only for the purpose of conservation; and that at the end of a war there shall be a strict accounting to the owners of that property by the Government of the United States, which may take it temporarily into its possession. That is one of the principles for which this country has contended for a hundred years. While, as Chief Justice Marshall said, the Congress may have the power to provide that the private property of alien enemies may be taken during a war, it can only do so by putting upon itself a moral turpitude of which we ought to be ashamed.

"The purpose of the joint resolution is simply to hold in status quo the things that have been done by the Alien Property Custodian. The joint resolution simply states that until a suitable adjustment has been made of the claims of American citizens against Germany *for the property that has been seized by Germany, the property in the hands of the Alien Property Custodian shall be held until Congress shall dispose of it."* (Italics ours).

As to the Treaty of Berlin.

Article I of the Treaty of Berlin reserves to the United States all of the rights accorded by the Peace Resolution, namely: "any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise."

The reservation of these rights gave to the United States the option to exercise them or not, as it might wish. Unless and until those rights should be so exercised, the provisions of the Treaty of Versailles relating to them remained wholly inoperative, so far as the United States is concerned. Moreover, the rights could only be exercised "in a manner consistent with the rights accorded to Germany under such provisions" (Treaty of Berlin, Article II). As was said by Professor Hessel

Yntema in the Columbia Law Review for June, 1923 (Vol. XXIII, page 511):

> "It cannot be too much emphasized that the Treaty of Versailles has been definitely refused the ratification of the United States and is, therefore, not binding upon the United States *proprio vigore*. The situation is rather that the substance of certain of its provisions are to be read into the Treaty of Berlin *conditionally upon the assertion of claims by the United States in accordance therewith.*"

At no point has the procedure adopted by the United States in respect to claims or reparations followed that prescribed by the Treaty of Versailles. For example: The Allied Powers gave Germany credit on reparation account for all German tonnage seized and appropriated by them. No such credit has been given by the United States, but on the contrary, under the terms of Article 3(a) of the Paris Agreement of January 14, 1925 the United States will collect in full its claim for the costs of the American Army of occupation, as well the claims of American citizens against Germany (which together represent the nearest approach to reparations that the United States has demanded) out of a fixed proportion of the annual payments to be made under the Dawes Plan.

Another instance of the way in which the United States has diverged from the Treaty of Versailles is found in the fact that this country has not adopted for the disposal of seized German property any of the three methods provided by Article 297 of the Versailles Treaty. It has neither (1) adopted the Clearing House provisions, nor has it (2) returned such property direct to its owners, nor (3) used the proceeds of such property to satisfy American claims against Germany. On the contrary, the United States has adopted a method not contemplated at

all by the Treaty of Versailles, namely, by the creation of the Mixed Claims Commission. This body, so far as that Treaty is concerned, would have no right whatever to exist or function.

Not one instance can be cited in which the United States has exercised the right reserved to it by the Treaty of Berlin to avail itself of the provisions of the Treaty of Versailles; and to contend, in view of this divergence, that the Treaty bars appellant from claiming compensation for its ships, is to ignore the very terms of the Treaty itself.

II.

THE COURT BELOW ERRED IN HOLDING THAT IT HAD NOT JURISDICTION TO HEAR THE CASE AT BAR.

In order to give the Court of Claims jurisdiction over a claim against the United States, these elements must be present:

A. The claim must be founded on the Constitution of the United States, or on a law of Congress, or on a regulation of an Executive Department, or on an express or implied contract with the Government of the United States;

B. The claim must be one not sounding in tort; (36 Stat. 1136).

C. If claimant is not an American citizen, it must be shown that the courts of claimant's country grant reciprocal rights to American citizens (36 Stat. 1139).

These requirements are fully met in the instant case. The fact that the courts of Germany grant reciprocal rights to American citizens is not disputed. That appel-

lant's claim is founded on the Constitutional provision forbidding the taking of private property for a public use without compensation has already been demonstrated on pages 41 to 53 of this brief.

A. Appellant's claim is founded on an implied contract to compensate.

The assertion that appellant's claim is founded on an implied contract is amply justified by the decisions of this Court.

In *U. S.* v. *Great Falls Mfg. Co.* (1884), 112 U. S. 645 (at foot of p. 657), 28 L. Ed. 846 (2d column of p. 850), this Court states that the question before it for decision, is the great question that was reserved in the *Langford Case, viz.,* (in substance)

Whether, when the Government, acting by the forms which are sufficient to bind it, recognizes the fact that *it is* taking *private* property for public use, the compensation may not be recovered in the Court of Claims.

After stating the facts upon which the foregoing question arose the Court lays down the rule of law in the following words: (112 U. S. 656; 28 L. Ed. 850.)

> "* * * *we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the mean-*

ing of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States."

It is important to note that at the time of this decision, the statutory scope of the jurisdiction of the Court of claims was less extensive than now. The statute then in force provided (act of February 24, 1855, 10 Stat. at L. 612, Sec. 1) as follows:

> "That a court shall be established to be called a Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behavior; and the said Court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said Court by either house of Congress."

The substantial difference (as respects the present case) between the statute of 1855 and the present one is, that the jurisdiction given by the 1855 Act did not expressly extend to claims founded upon the Constitution. Even so, however, this Court held that the constitutional provisions involved in the present case operated for the protection of plaintiffs under the earlier act, *and the Court applied the protection by holding that a taking which, if not compensated for, would violate the Constitution, raised an implied promise to pay compensation.*

To avoid the possibility of confusion we refer also to the separate and unrelated case of *Great Falls Manufacturing Co.* v. *Garland* (1888), 124 U. S. 581; 31 L. Ed.

527, for the purpose of pointing out that the act of July 15, 1882 (22 Stat. at L. 168), which related to the same water supply project and which especially conferred jurisdiction upon the Court of Claims in connection with questions which might arise under it, was not a factor in the decision of the case in 112 U. S. upon which we rely. This statute was not enacted until after the decision in the prior action in the Court of Claims (1880—16 Ct. Cl. Rep. 160), which decision, like that of the Supreme Court, was in favor of the plaintiff and upon like grounds.

At the same term at which the *Great Falls Manufacturing Co. Case* upon which we here rely was decided, this Court held that the right of the patentee under letters patent for an invention is exclusive as to the Government as well as to others, and by way of dictum observed:

> "If the right of the patentee was acknowledged and, without his consent, an officer of the Government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie, within the jurisdiction of the Court of Claims, such as was entertained and sanctioned in the case of *U. S.* v. *Mfg. Co.*, decided at the present term." *Hollister* v. *Benedict*, 113 U. S. 59; 28 L. Ed. 901.

In *U. S.* v. *Palmer*, 128 U. S. 262, 32 L. Ed. 442, this Court affirmed a judgment of the Court of Claims allowing damages to the claimant for the Government's use of his patent, with his consent and with the expectation on his part of receiving a reasonable compensation for the license. The United States asserted that the matter was essentially tort and not an implied contract. The Court held otherwise.

The point is put entirely at rest by the decision in *U. S.* v. *Lynah* (1903), 188 U. S. 445, 47 L. Ed. 539, the facts in which are stated quite fully in an earlier part of this brief (p. 34). Justice Brewer, stating the majority opinion, discusses the cases of like character which had gone before and sums the whole matter up by repeating that part of the opinion in the *Great Falls Mfg. Co. Case* which we quote on p. 61 *ante*.

At the time of the decision of this case the statute conferring jurisdiction on the Court of Claims stood as it stands now. Of course, the force of this decision is not detracted from by the fact that what this Court affirmed was a judgment of the District Court and not the Court of Claims. The suit was instituted in the District Court because the amount claimed did not exceed $10,000, and the provision of the Judicial Code giving the District Court concurrent jurisdiction is in substantially the same words as the paragraph granting jurisdiction to the Court of Claims. (See 36 Stat. at L. 1091, sec. 24, par. 20).

The Court below, in support of its decision that no implied contract arose in the case at bar, stated that the circumstances surrounding the taking of private property by the Government may be such as to rebut the implication of a contract (R. 9); that the taking in the case at bar was an exercise of the war power of Congress (R. 9); and that the obligation of the Fifth Amendment to make compensation for private property does not affect the exercise of that power when enemy property is taken (R. 10).

It is undoubtedly true that Congress possesses the legal power to confiscate private enemy property (although that practice has long fallen into disuse among civilized nations); it is equally true that the limitations of the Fifth Amendment will not bar the exercise of this power, and that if confiscation were decreed by Congress

that fact would certainly rebut the implication of an implied contract to compensate. But these propositions are all predicated on *confiscation*, and it is precisely that which makes the Court's reasoning inapplicable to the case at bar. We have here no vestige of evidence that Congress effected, or intended to effect, confiscation by the Joint Resolution of May 12, 1917. Indeed, this is recognized by the Court below in its opinion (R. 13) as follows:

> "We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value."

The authorities cited by the Court in support of its assertion that there was no implied contract to compensate appellant will prove, on analysis, to have little application to the case at bar. *Green's Case*, 10 Ct. Cls. 466, the facts of which are set forth in detail in the opinion of the Court, dealt with enemy property seized *in hostile territory*, and the rule of law enunciated in that case expressly limits its application to "acts of (Government) officers done under color of its authority within the insurrectionary district".

So in *U. S.* vs. *Klein*, 13 Wall., 128, the cotton whose seizure was the basis of the suit, had been seized within rebel territory. The same was true in the *Moore Case*, 10 Ct. Cls. 375, when the rosin involved was seized in captured territory and by a military officer acting merely under military authority and not pursuant to any act of Congress.

The importance of this distinction was pointed out by Alexander Hamilton in his "Camillus Letters" XIX, wherein he said:

> "There is no parity between the case of the persons and goods of enemies found in our own country and that of the persons and goods of enemies found elsewhere. * * * In the latter case there is no confidence whatever reposed in us; no claim upon our hospitality, justice or good faith; there is the simple character of an enemy, with entire liberty to oppose force to force."

Every writer on international law has emphasized the difference between the principles applicable to taking, for the use of the military forces, the property of the enemy found in the enemy's country or in the theatre of war, which is permitted, and taking his goods found outside the theatre of war and in the territory of the other belligerent, concerning which the doctrine of courts and writers ranges from the declaration that such property "may be taken although not without obloquy" (Chief Justice Marshall, *Brown* v. *U. S.*, 8 Cranch 110) to the doctrine announced by Mr. John Bassett Moore, quoting Hall, that "property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation" (Moore's Digest of International Law, Vol. 7, p. 308), which doctrine is especially applied to merchant ships in the Hague Conventions, 1907 (*supra*, p. 18), in guaranteeing them the right to depart, or in lieu of the same, restoration after the war or requisition on payment of compensation.

Young's Case, 97 U. S. 39, from which the Court below quotes in its opinion (R. 11), has no bearing whatever on the case at bar. All that was decided by that case was that a British subject whose cotton had been seized in Confederate territory during the Civil War and who had given aid and comfort to the rebellion, was thereby

excluded from the privilege granted by statute to sue for the proceeds of his property, title to which (but for the statute in question) would have been forfeited absolutely to the United States under the Confiscation Acts; because being a British subject, he had by his actions committed no criminal offense against the United States and was therefore not included in the general pardon and amnesty granted to rebels.

B. Appellant's claim is one not sounding in tort.

This Court, in the case of *U. S.* vs. *Lynah* (188 U. S. 445, 47 L. Ed. 539) has laid down a clear rule of guidance to distinguish between cases of implied contract and cases of tort as affecting the jurisdiction of the Court of Claims. Preceding decisions are discussed and it is made to appear that the cases in which a taking of property is to be considered as a tort, and therefore not giving rise to jurisdiction, may be classified under two general descriptions: (a) where Government officers have committed an unauthorized act, and (b) where the taking is based on a claim of title in the Government. In these two classes of cases it must be conceded that the taking is tortious and does not give rise to a right of action. But, to quote Mr. Justice Brewer in the *Lynah Case*, "How different is the case at bar!"

In the case at bar there was no unauthorized act. The Joint Resolution gave explicit authority and the officers who took possession acted pursuant to the executive order which was based on the Joint Resolution and set forth its terms in full. Neither was there any claim of title in the Government. On the contrary, both the Joint Resolution and the executive order expressly recognize title in others. Tort, therefore, is entirely outside the case, and so far as the theory of tort is concerned the case is ruled by the pronouncement in *U. S.* v. *Lynah* (p. 464 of 188 U. S., p. 546 of 47 L. Ed.) that

> "The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates."

The Court below apparently believed that the facts in the case at bar remove it from the operation of the rule just quoted; and in support of that belief cited the cases of *Ribas y Hijo* vs. *U. S.*, 194 U. S. 315 and *Herrera* vs. *U. S.*, 222 U. S. 558.

Both of these cases grew out of the seizure of ships during the war with Spain. In the *Hijo* case a merchant ship of Spanish registry was taken at Ponce, Porto Rico, by the United States naval and military forces on the capture of that city, and was thereafter used for some months by the Quartermaster's Department of the army. This Court on page 322 of its opinion said:

> "Its claim is not founded on the Constitution of the United States, or on any act of Congress, or on any regulation of an executive department. Nor can it be said to be founded on contract, express or implied. There is no element of contract in the case; for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. * * * The seizure, which occurred while the war was flagrant, was an act of war, *occurring within the limits of military operations.* The action, in its essence, is for the recovery of damages; but as the case is one sounding in tort, no suit for damages can be maintained under the statute, against the United States." (Italics ours.)

The facts in the *Herrera* case were identical, except that the ship was seized shortly after the *surrender* of

the city where it was found, instead of after a *capture*. This Court based its decision largely on the *Hijo* case, and said (quote 222 U. S., p. 572):

> "We must regard the seizure of the *San Juan* as an exertion of the war power, and by this we do not mean as mere 'booty of war,' and the comments made in *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 495, in regard to an attempt by the commander at New Orleans, fifteen months after the occupation of the city by the National Government, to confiscate the indebtedness of one of the banks to the other, do not apply. We only mean that the seizure was for the immediate use of the army, a right recognized in that case, for we do not accept the view contended for by claimants that with the surrender of Santiago and the cessation of active operations in the Santiago district enemy property lost such character and was not subject to such right of capture. The war was flagrant elsewhere, and in such case *Planters' Bank* v. *Union Bank* is authority for the right, not against it."

This Court said further that if it were to be assumed that the vessel there in question was immune from seizure, and if that seizure was in violation of a Presidential proclamation relied on by the claimant, then the acts of the officers who seized and used her were done in wrong, "and the claimants encounter the prohibitions of the Tucker Act against the jurisdiction of the Court of Claims" (p. 573).

With these decisions we have no quarrel. What we wish to emphasize is that both cases deal with seizures made in hostile territory, for the immediate use of the military forces of the United States, and on the discretionary orders of military officers; and in citing these cases as authority for the case at bar, wherein the seizure was lawfully made pursuant to an Act of Congress, with-

in the territory of the United States, and months before any military operations were organized, the Court below apparently overlooks the vital distinction between the two kinds of seizure. This distinction has been pointed out not only by Hamilton ("Camillus Letters", p. 66 *supra*) but by many other writers on international law. See:

Bentwich, Private Property in War, London, 1907, p. 41.
H. Rep. 386, 22nd Cong., 1st Sess., pp. 9-10.
Lawrence's Report on Claims against Governments, H. Rep. 134, 43rd Cong., 2nd Sess., 126.
Nys, Droit International (1912 ed.) v. III, ch. XI, pp. 450-462.

C. The fact that the joint resolution did not specifically confer jurisdiction on the Court of Claims does not bar it from such jurisdiction.

The Court below, in support of its decision that it was without jurisdiction over the case at bar, remarked (R. 12):

"The power to hear and determine suits against the United States should not and does not rest in mere inference or implication".

The truth of this statement may readily be conceded. But when it has been established that a particular claim falls within any of the classes of cases as to which the United States has expressed its willingness to be sued,—as for example, that the claim is founded on the Constitution, or on an Act of Congress, or an express or implied contract—then it is not a mere inference or implication to assert that the determination of such claim comes under the general jurisdiction of the Court of Claims. Were this not true, how purposeless would be Section 145 of the Judicial Code, wherein are enumerated the various kinds of claims over which that Court is given jurisdiction.

In support of its reasoning the Court below points out (R., 12) that in various statutes enacted during the recent war authorizing the taking of private property, the courts were designated wherein claims for compensation might be brought. To argue that because in certain instances this was done, therefore no jurisdiction was conferred in instances where it was *not* done, is unsound logic. That such reasoning is fallacious is illustrated by the case of *Duckett & Co.* vs. *U. S.*, 45 Sup. Ct. Reporter 38, referred to *supra* at p. 39. In that case the statute authorizing the seizure of claimant's property made no reference to any forum for the determination of such claims, and the Court of Claims dismissed the suit on the ground that no contract with the claimant could be implied (58 Ct. Cls. 234, 403). This Court, however, in reversing the decision said: "there is no doubt concerning the jurisdiction of the Court of Claims." (p. 39).

In its opinion in the case at bar the Court below points out (R., 12, 13) that the last three sections of the Joint Resolution as originally drawn, one of which authorized suits in the Court of Claims by parties interested in the seized ships, were stricken out by amendment in the Senate, which action was concurred in by the House. This, the Court asserts, indicates an intention on the part of Congress not to authorize suits in that Court.

Since the Court below has deemed it proper to refer to the history of this enactment while it was before Congress as a guide to its construction, it is permissible to consider the details of that history and to examine the journals and debates of Congress relating to the enactment. On doing so, it appears that when the Joint Resolution in its original form was reported to the Senate by the Judiciary Committee on April 30, 1917, the debate in that body contained only one speech dealing with the question of whether the owners of the seized ships should

be relegated to the Court of Claims for compensation. This speech was made by Senator Lewis of Illinois, who spoke on the question as follows (Cong. Record, Vol. 55, Part 2, page 1574):

> "Now, second, I regard it most unwise from my viewpoint that we should provide in a measure that the foreign country to be paid or its people to be paid that these shall go into the Court of Claims of the United States. We have a specific act creating the Court of Claims. We have authorized our citizens to go into that court; and they must go into the court, as the eminent Senator recognizes, to have their claims adjudicated; and then there has to be an act of Congress to satisfy the judgment. We ought not to do such a thing in the case of foreigners or foreign countries.
>
> "The method the able Senator from Pennsylvania suggests appeals much to me," (Note by counsel—this was a requisition for use, with payment of compensation for such use after the war).
>
> "If we are to adopt a method at all, sir, it should be through the diplomatic department or through the Executive department, in so far as compensation is to be provided. We ought not to provide here, sir, that it should be done by forcing these people to come into the Court of Claims, litigate in the United States in a forum that is distinctively ours. After the war is over an international tribunal, or some kind of a tribunal that is not distinctively a forum of our own, ought to be created in which some of their people have a right to sit in the judgment—some diplomatic officer or some commissioner. We should not now say that they shall come into our court with our judges, our lawyers and our advocates—our trib-

unal. That, sir, does not appeal to me to be in the spirit of the meaning of the treaty,* and at the very outset will give, if not cause, atmosphere to the charge of direct unfairness; and as I see it, in direct violation of all international precedent in matters of this kind."

(After an interruption in which it was suggested that the matter be considered in executive session, Senator Lewis continued as follows):

"I now wish to ask—and to this I invite the attention of Senators—third, is it wise that we should provide in a measure, if we pass any at all, remitting these people to our courts solely and wholly, refusing any audience——"

(Here Senator Lewis was again interrupted with the suggestion of an executive session, and immediately thereafter a vote was taken on the proposed amendments to the Joint Resolution, as a result of which Sections 3, 4 and 5 were stricken out).

If significance is to be attributed to the striking out of the provisions relating to the Court of Claims, equal significance must be attributed to the only reason disclosed by the records of Congress which actuated the Senate in striking out these provisions. If this be done, it is clear that their motive for taking this step was not to *deprive* the Court of Claims of jurisdiction, but to avoid *restricting* claimants to that forum, where even after the war they might conceivably be placed at an unfair disadvantage; and by not limiting claimants to a particular method of redress, to leave them free either to exercise their legal right to resort to the Court of Claims, or to apply to such tribunal as might thereafter be created to pass upon their claims.

* The treaty with Prussia of 1828.

To determine the true meaning and purpose of the Joint Resolution, no better rule can be applied than the one stated by this Court in the case of *Texas and Pacific Railway* vs. *Interstate Commerce Commission*, 162 U. S. 197, in which it was said (p. 218):

> "It must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions and, therefore, most likely to have been the construction intended by the law-making power."

The legislation here in question was experimental. No act precisely like it had ever before been adopted by this country. To interpret it as confiscatory or as barring appellant from the only forum in which a claim could lawfully be presented, would be contrary to the genius of our institutions and the principles on which our Government is founded.

If this rule be applied, no difficulty will be encountered in holding that appellant's petition sets forth a cause of action against the United States, that the Court of Claims has jurisdiction, and that its judgment should be reversed and the case remanded to that Court for a hearing on the merits.

Respectfully submitted,

WILLIAM B. DEVOE,
Attorney for Appellant.

15 Park Row,
New York City.

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